APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED JANUARY 25, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 25th day of January two thousand and one.

PRESENT: Ellsworth Van Graafeiland,
Jon O. Newman,
Pierre N. Leval,

Circuit Judges,

No. 00-6249

ZARY MAREKH, on behalf of herself and others similarly situated,

Plaintiff-Appellant,

v.

EQUIFAX; EXPERIAN, formerly, TRW; TRANS UNION,

Defendants-Appellees,

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UNITED STATES OF AMERICA,

Intervenor-Defendant-Appellee.

* * *

Appeal from the United States District Court for the Eastern District of New York (Dearie, *J.*).

Plaintiff Zary Marekh appeals from the dismissal of her constitutional challenges to the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.* In particular, Marekh challenges the constitutionality of 15 U.S.C. § 1681h(e), which limits common law defamation, invasion of privacy, and negligence actions. This section states that a consumer who brings any action or proceeding for defamation, invasion of privacy, or negligence based on information in credit reports needs to prove malice or willful intent to injure on the part of the credit agency in order to recover. Marekh alleges violations of numerous constitutional provisions, including the First Amendment, the Tenth Amendment, and the Due Process Clause, and claims that the enactment exceeds Congress's constitutional authority under the Commerce Clause.

We find no merit in any of Marekh's challenges to the constitutionality of the FCRA. None of her arguments raise a serious question as to the constitutionality of the FCRA, let alone the "plain showing" that is required for us to declare an Act of Congress unconstitutional. *See United States v. Morrison*, 120 S. Ct. 1740, 1748 (2000).

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ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED**.

FOR THE COURT:
ROSEANN B. MacKECHNIE,
Clerk

s/ Lucille Carr

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JULY 13, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

97 CV 4517

ZARY MAREKH,

Plaintiff,

– against –

EQUIFAX CREDIT INFORMATION SERVICES, INC., TRW, INC., TRANS UNION CORP.,

Defendants.

MEMORANDUM & ORDER

DEARIE, District Judge.

Zary Marekh brings this action under the Fair Credit Reporting Act (the "FCRA") on behalf of herself and others similarly situated against three credit reporting agencies ("CRAs"), TRW, Inc., Trans Union Corporation and Equifax Credit Information Services. *See* 15 U.S.C.A. §§ 1681, *et seq*. Plaintiff's credit report allegedly contained factual errors that reflected negatively on her credit history. According to the complaint, she was consequently denied business and automobile loans. Plaintiff also pleads a RICO

claim, as well as common law claims of fraud, defamation, negligence, invasion of privacy, unjust enrichment and emotional distress.

Section 1681 of the FCRA requires a plaintiff to demonstrate that a defendant acted with actual malice. Defendant has filed a 12(b)(6) motion to dismiss because plaintiff has not alleged actual malice. Plaintiff has filed a cross-motion challenging the constitutionality of the actual malice standard under the FCRA. Plaintiff argues that consumers possess a constitutional right to sue CRAs and that the "actual malice" requirement unduly infringes that right. Plaintiff claims that the FCRA's requirement that consumers demonstrate actual malice affords these reports the same level of protection as First Amendment speech, even though they relate to private persons in private matters and thus should not be afforded such protection. The United States has intervened in support of the defendants' motion and in opposition to plaintiff's cross-motion.

At a pre-motion conference, plaintiff's counsel acknowledged that if the constitutional claim is rejected, plaintiff's remaining claims, with the possible exception of unjust enrichment, must fail. *See* Transcript of Civil Cause for Pre-Motion Conference, dated February 4, 1998, at 11-12.

Discussion

In considering a motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6), the Court must accept the factual allegations in the complaint

as true, *Papasan v. Allain*, 478 U.S. 265, 283 (1986), and construe the allegations in the plaintiff's favor. *La Bounty v. Adler*, 933 F.2d 121,123 (2d Cir.1991).

Plaintiff's Cross-Motion

Plaintiff claims that the FCRA violates the principles of separation of powers because the legislature cannot "compel the courts to adopt a particular construction of a law [and] cannot requir[e] of them a construction of the laws according to its own views." Cross-Motion at 9 (citing Thomas Cooley, *Constitutional Limitations* 94-5 (1868)). According to plaintiff, the FCRA must be struck down to preserve the balance of powers between the courts and Congress. Plaintiff argues that Congress' inroads into the law of defamation through its articulation of an "actual malice" standard is "a hostile takeover of the Judiciary's role as one of the three enumerated powers." *Id.* at 10-11.

Plaintiff then suggests that the FCRA is inconsistent with the enumerated powers requirement and its operation effectively obliterates the Tenth Amendment. *See id.* at 12. Plaintiff maintains that Congress is using the FCRA to re-write the common law of the states, which is a power reserved to the states under the Tenth Amendment. *See id.* at 15. The FCRA places limits on the lawsuits that may be brought and, in so doing, plaintiff maintains that it "skews the balance of power between the legislative powers of Congress and the States [sic] traditional area of protection for its citizens." *Id.* Plaintiff further suggests that the FCRA somehow suspends Due Process in that it preempts rulings of the Supreme Court. Plaintiff describes the right to bring

an action for defamation as a due process right and suggests that the "insurmountable 'actual malice' standard" denies plaintiff his right to bring suits for defamation. Plaintiff points to Supreme Court cases that declined to extend *New York Times Co. v. Sullivan's* actual malice standard to claims of private parties. Specifically, plaintiff cites *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973) in which the Supreme Court held that the fact that the expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times* when a non-public person was slandered. *Cross Motion* at 21. Somewhat more germane, plaintiff invokes *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), a case that involved credit reports, for the proposition that when non-public persons and issues are involved, courts may allow defamation suits upon a lesser showing than "actual malice". *Cross-Motion* at 21.

Finally, plaintiff asks the Court to use a strict scrutiny standard in evaluating FCRA's constitutionality. Plaintiff suggests that citizens possess a fundamental right to petition for redress when one's good name has been defamed, and the "actual malice" standard undermines this right. *See id.*, at 28-9.

Tenth Amendment Analysis

Plaintiff even argues that Congress may exercise its constitutional authority to regulate interstate commerce, but only in a manner consistent with existing state law. Long-standing constitutional precedent simply does not support this view. It is well-established that when Congress chooses

to regulate an area of commerce under its interstate commerce power, its legislation preempts state law on the same subject, to the extent that the state law interferes with the achievement of federal objectives. *See Cippollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *Gade v. Nat'l. Solid Wastes Mgmt. Assn.*, 505 U.S. 88 (1992).

Defamation

Plaintiff attempts to craft a First Amendment challenge to the actual malice requirement in the FCRA. He argues that *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), stands for the proposition that when non-public persons and issues are involved, courts may allow defamation suits upon a lesser showing than "actual malice". *See Cross-Motion* at 21. Plaintiff argues that a suit under the FCRA involving a private person should thus be allowed upon a lesser showing.

Plaintiff may embrace *Greenmoss* for this proposition, but the case offers no such comfort or support. Although the Supreme Court concluded that "permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern," *Greenmoss*, 422 US at 763, the Court surely did not state that "actual malice" is inappropriate, much less unconstitutional, for all private transactions. Thus, while Congress does not require an actual malice standard in private actions, this case cannot be read for the proposition that this heightened standard may not be applied in any private dealings.

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Moreover, in developing this argument, plaintiff ignores the focus of *Greenmoss* and subsequent decisions. These cases concern the constitutional right of the speaker or alleged "defamer". They have no conceivable application here where the issue is not whether the CRAs have the right to "speak," but whether a party can recover for their misstatements absent a showing of actual malice.

Separation of Powers

Separation of powers principles only regulate Congress' relationship with other branches of the federal government. They do not affect Congress' power to preempt state common law, as suggested by plaintiff. Although the work load of the federal judiciary might be affected by the FCRA, the constitutional powers with respect to the legislative branch are not.

Strict Scrutiny

Strict scrutiny is only applied in reviewing legislation that affects fundamental rights. Plaintiff revised the fundamental right at issue (she described it earlier as a right to protect one's good name) in a Reply Brief and she bemoaned the diminution of her "right to petition the court with grievances." Although this right is undoubtedly central to the judicial process, it has never been recognized by the Supreme Court as rising to the "fundamental" level that would authorize the application of a strict scrutiny standard.

The appropriate standard of review of the constitutional issue in this case is the "rational basis" test, which mandates

a reasonable relationship to a legitimate government interest. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974). Congress has a legitimate interest in regulating businesses such as credit reporting agencies. In enacting the FCRA, Congress advanced this interest by providing consumers with access to the name of any CRA issuing a report on which a decision affecting such consumer's credit is based. However, Congress also recognized that the cost of verifying each credit reported would be prohibitive for CRAs. Thus, Congress resolved that CRAs were not required to verify consumer credit information prior to issuing a consumer credit report. It is now well-settled that credit reporting agencies are not obligated under the FCRA to check the accuracy of information appearing on the reports they generate or issue. *See, e.g., Podell v. Citicorp Diner's Club, Inc.*, 914 F. Supp. 1025, 1032 (S.D.N.Y. 1996) (declining to impose liability simply because credit reporting agencies included inaccurate information in plaintiff's credit report). *See also, Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151, 1156 (11th Cir.1991); Thompson v. San Antonio Retail Merchant's Association, 682 F.2d 509, 513 (5th Cir.1982); Hauser v. Equifax, Inc., 602 F.2d 811, 814-15 (8th Cir.1979)*. Also, Congress recognized that, unless CRAs were afforded some protection, they would face enormous exposure to defamation suits. Thus, a qualified privilege was established by Congress to permit defamation lawsuits only when the CRAs have acted with "actual malice." *See* 15 U.S.C. § 1681(h)(e). This qualified privilege was effectively a "quid pro quo for full disclosure," whereby consumers have full access to their credit information and the CRAs providing such information have some measure of protection. *See* 115 Cong. Rec. 22411 (November 6, 1969). Thus, Congress

increased access to such reports without destroying the incentive necessary to continue providing such reports. *See* Defendants' Consolidated Reply in Support of Their Motion to Dismiss at 3. The requirements imposed upon CRAs and the substantive conditions of recovery by aggrieved individuals through Congress' enactment of the FCRA are reasonably related to legitimate legislative goals.

Further, as developed more fully in the consolidated defense submissions, this qualified privilege is unheard of at common law. Plaintiff's claim to the contrary and his lament about Congress' assault on the common law is simply unsupportable.

Common Law Causes of Action

For the reasons described above, the FCRA does not violate the Constitution. As plaintiff has conceded, if the Court upholds the constitutionality of the FCRA, the other claims must be dismissed. *See* Transcript of Civil Cause for Pre-Motion Conference, dated February 4, 1998, at 11-12.

The Court declines to exercise jurisdiction over remaining state law negligence claims.

RICO and Class Action Claims

Plaintiff's zestful attack on the constitutionality of the FCRA has, unfortunately, led it astray in pleading RICO and class action claims. Although the RICO claim is deficient in many ways, plaintiff concedes that it is at a minimum based on its constitutional argument and must therefore be dismissed once the Court upholds the malice requirement.

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The class action claim, based presumably on an assertion of unjust enrichment enjoys, according to plaintiff, a lingering presence. The Court disagrees without hesitation. Count VIII of the Amended Complaint fails to allege the necessary elements of an unjust enrichment claim. Indeed, given the nature of this dispute, it is inconceivable that a plaintiff could satisfy the pleading requirements, alone or as a member of the class. Beyond the obvious and irreparable deficiencies of the unjust enrichment claim, plaintiff barely pays lip service to the requirements of Rule 23 of the Federal Rules of Civil Procedure. Indeed, almost by definition, an individual's claim against a credit reporting agency would of necessity be a highly individualized endeavor, contrary to any notions of particularity with or without a malice requirement.

Conclusion

For the foregoing reasons, defendant's 12(b)(6) motion is granted.

The Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: Brooklyn, New York
July 13, 2000

s/ Raymond J. Dearie
RAYMOND J. DEARIE
United States District Judge